SUPREME COURT, U.S.
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No. 05-184

IN THE
Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,
v.

DONALD RUMSFELD ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S SURREPLY REGARDING RESPONDENTS' MOTION TO DISMISS

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The government contends that this Court must construe the Detainee Treatment Act (DTA) [1] to strip this Court of jurisdiction to decide a pending case of enormous national and international significance, even though the Act says nothing about this Court's jurisdiction and specifically provides for retroactive application of its other provisions. Every relevant statutory canon counsels against the government's conclusion. Critically, the government has yet to deny that the obvious effect of its interpretation would be to deprive not only this Court, but *any* court, from deciding the questions upon which certiorari has been granted. That consequence not only renders the statute retroactive within the meaning of *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), it also provides a compelling reason to reject the government's interpretation and avoid grave constitutional questions. Thus, rather than dismiss this case a few short weeks before the scheduled oral argument, this Court should deny the motion or, at the very least, defer its resolution until the hearing on the merits.[2]

1. Section 1005(e)(1) does not apply to this case. Although all of the DTA's provisions applied to pending cases in the first draft of the bill, the bill was amended to exclude (e)(1) from that rule. The government's contrary position cannot be reconciled with elementary canons of construction: It reads sections 1005(h)(1) and (2) to have the same meaning despite their very different language (Pet. Opp. 6-7); it reads into the DTA an effective-date provision Congress eliminated (Pet. Opp. 8-12); and it strips this Court of

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[1] The text of the DTA is attached in Appendix A. The appendix was inadvertently omitted from Hamdan's opposition.

[2] Missing from the government's filings is any answer to the simple conclusion that it's reading of the DTA gives the President the power to block *any* federal court review by leaving the final decision on his desk. The two current court-martial death-penalty cases have awaited final decisions by the President for ten years and five years, respectively. *See Amicus Br. of Chief Defense Counsel in Support of Cert.* 2, 14. Even those cases have already been reviewed by the Court of Appeals for the Armed Forces and this Court on certiorari. If the DTA permits the President to follow such a course *before* this Court's review, and in an *ad hoc* untested system, it would raise deep constitutional concerns.

jurisdiction over a pending case and raises constitutional questions, without a clear statement of intent to do so (Pet. Opp. 13-17).

a. Under *Lindh v. Murphy*, 521 U.S. 320 (1997), to determine whether a statute applies to pending cases, this Court first employs ordinary tools of statutory construction to determine Congress's intent. Only if these efforts fail does the Court rely on default rules of the type upon which the government's Motion entirely depends. Congress made its intent not to apply the DTA's jurisdiction-stripping provision to pending cases plain by deliberately amending the bill to provide that sections (e)(2) and (e)(3), but not (e)(1), *shall* apply to pending cases. The government—which still has no explanation whatsoever for that change—attempts to evade the problem by reframing the interpretive question as whether Congress had "reason to add special language to ensure the application of Section 1005(e)(1) to pending cases." Reply 4-5. But the question is not whether Congress would have had to add such language, but why it *removed* language that made the jurisdiction-stripping provision retroactive, if not for the reason that it intended only prospective application.[3] The government has no answer.

In its Reply, the government for the first time relies on *Martin v. Hadix*, 527 U.S. 343, 356 (1999), for the proposition that no inference arises under *Lindh* when provisions address "wholly different subject matters." Reply 5. While

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[3] The legislative history confirms that the reason for the change in language was the desire to avoid interfering with this Court's jurisdiction in this very case. Opp. 8-12; App. 21a-23a, 28a-29a. The government attacks that extensive history as a "one-sided account" "largely generated by a single Senator." Reply 7-8. To the extent the legislative history is "one-sided," that is simply because Senator Levin was the *only* one of the Act's authors who said *anything* before passage about pending cases. The only other cosponsor statement was that of Senator Reid, who explicitly, repeatedly, and publicly agreed with Senator Levin. *See* 151 Cong. Rec. S12840 (Nov. 15, 2005) (stating that Sen. Reid was cosponsor); Pet. Opp. 9 n.4, 11 & n.8. The government's assertion to the contrary is not supported by its citations, which consist of nothing more than statements explaining that detainees will be allowed to bring post-conviction challenges to the particular results of their commission adjudications. See Reply 8 n.7. That view is completely consistent with those of Senators Levin and Reid

Hadix may apply to section 1005(b)(2)—which prospectively *adds* rights to prevent coerced testimony in CSRTs—the case has no relevance to section 1005(e)(1). Section 1005(e)(1) is integrally related to, rather than "wholly different" from (e)(2) and (3). The government itself states that (e)(1) effectuates the exclusive jurisdiction created by (e)(2) and (e)(3), Reply 3, *and* that (e)(3) ousts jurisdiction, Reply 7, 13. These provisions are at least as related to one another as those in *Lindh*. In this case, Congress considered all three subsections together and applied only the latter to pending cases.

The government further argues that Hamdan's interpretation would give him greater appeal rights than the pre-DTA system. Reply 7. That claim is wholly contradicted by the government's own assurances that the old system guaranteed full federal jurisdiction after conviction. [4] Hamdan, moreover, does not seek review of the "final decision" Congress reserved to the D.C. Circuit, but rather review of the fundamental legality of the Commission itself—a question the government conspicuously declines to place within the D.C. Circuit's jurisdiction. Reply 10 n.8.

b. Unable to argue that the DTA's plain text manifests Congress' intent to strip this Court of its jurisdiction, the government resorts to a default rule which, it says, requires this Court to assume that Congress intended to interfere with this Court's jurisdiction over a pending case unless Congress clearly indicated a contrary intent. See Reply 5. But this Court has never dictated to Congress that it must impose an express "savings clause" to avoid the withdrawal of access to the Great Writ, particularly in light of the

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[4] See J.A. 184 (district court); J.A. 261 (Court of Appeals, "There's no question at the end of the day, at the end of commission proceedings, if Mr. Hamdan is convicted, he will have the opportunity to file a habeas petition and advance and have resolved whatever cognizable claims he chooses to make."). The DTA restricts those rights by requiring a "final decision," and not simply a "convict[ion]," before federal court review.

The government is also wrong to say that Hamdan's interpretation means the DTA has no effect on the dozens of pending detainee actions, Reply 2, for those with final decisions—which the government contends is nearly all of them—may be streamlined under the DTA. Pet. Opp. 22-23.

constitutional difficulties such a rule would engender.

Rather, the government now seemingly concedes, as it must, that *Bruner v. United States*, 343 U.S. 112 (1952), and similar decisions involve statutes that "affect only *where* a suit may be brought, not *whether* it may be brought at all," *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997). Thus, in *Hallowell v. Commons*, 239 U.S. 506, 508 (1916), the legislation preserved the plaintiff's claim entirely but held that it must be presented to a confirmed statutory Executive-Branch official instead, which took "away no substantive right, but simply change[d] the tribunal that is to hear the case." Because such statutes do not eliminate previously conferred rights (much less constitutional rights Congress is not at liberty to dispense),[5] they do not give rise to a presumption against retroactivity.[6] The DTA, however, is different, for it eliminates entirely the ability to ever bring an array of claims. See Pet. Opp. 13-16. As noted in Hamdan's Response, to suggest that this case is of a piece with *Hallowell* is to fundamentally misconstrue the issues at stake and the nature of the post-conviction review of the DTA.

c. While the government's brief includes a footnote maintaining that petitioner will be able "to advance

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[5] Nothing in *Hallowell* suggests that the repealing statute foreclosed constitutional or systemic challenges to Indian land allotments. To the contrary, there is every reason to believe that had Hallowell sought to bring claims analogous to Hamdan's, he could have brought a common-law mandamus action. Indeed, just four months after *Hallowell*, this Court expressly *refused* to decide whether there was also no longer an available mandamus claim if the Secretary of the Interior abused his discretion or otherwise acted without jurisdiction. *See Lane v. United States ex rel. Mackabet*, 241 U.S. 201, 209-10 (1916); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004) (summarizing pre-APA mandamus practice).

[6] The government's new claim that Congress would have known that the jurisdiction-stripping provisions did not trigger a presumption against retroactivity, such that it was unnecessary to specify that section 1005(e)(1) applies to pending cases, rests on the implausible supposition that Congress followed two concurring opinions and two dissenting opinions of members of this Court. Reply 9-10. The notion that those opinions state the law, and that Congress in turn relied on them, is even more strained as a canon of statutory construction than as a theory of jurisprudence

constitutional and statutory challenges to his military commission in the event he is convicted," Reply 10 n.8, that carefully worded statement avoids taking a position on the central question upon which its reliance on *Bruner* depends: whether Hamdan would be permitted to bring his *present* claims in the D.C. Circuit. As Hamdan has stated, Pet. Opp. 14-16, and as the government never contradicts, the DTA precludes the two questions upon which certiorari was granted.[7] Until the government favors this Court with a straightforward answer otherwise, there is no basis for accepting its vague suggestions that the DTA only transfers jurisdiction instead of destroying his claims altogether.

The Reply, moreover, is internally inconsistent. It maintains that Congress "presumably" specified that sections 1005(e)(2) and (3) apply to pending cases "to *reinforce* the jurisdiction-removing effect of Section 1005(h)(1)." Reply 6. But on the government's reading of *Bruner*, it was entirely unnecessary to "reinforce" this point, and there certainly was no more reason to "reinforce" it with respect to sections 1005(e)(2) and (3) than (e)(1).[8] Rather, the government seeks to restore the effective-date language of the original Act that the Senate explicitly abandoned. The "plain" language of the enacted law is most fairly read as not applying to this case, or at the very least is ambiguous. To argue that it manifests Congress's "clear intention" to foreclose Article III review of Hamdan's claims is to turn statutory-construction jurisprudence on its head.[9]

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[7] The government has argued that the DTA did "more than remove jurisdiction, but...also limit[ed] the scope of cognizable claims." Mo. Dis. 19 n.9; *id.* 8 (Act "further confines the District of Columbia Circuit's jurisdiction"); *id.* 19 (acknowledging "some eliminated claims").

[8] Indeed, the government has offered no explanation for how a case could possibly be "pending" under (h)(2) when its own reading of (h)(1) wipes all cases out and totally precludes them from "pending," Pet Opp. 7.

[9] At the very least, there is no reason to conclude that Congress would have assumed, on the basis of this Court's past decisions, that section (e)(1) would apply to pending cases in the absence of a clear statement. The point is well-illustrated by the fact that to support its interpretation of its default rule, the government is forced to rely repeatedly on concurring and dissenting opinions from this Court. Reply 9-10. (Some of those

2. Even if section (e)(1) applied to pending cases, the government does not even attempt to respond to Hamdan's two independent reasons why the district court nonetheless retains jurisdiction over this case. *First*, Hamdan argued that the DTA bars the district court only from "hear[ing] or consider[ing]" specified original actions, but not *carrying out* an order of this Court. Pet. Opp. 30-31. Congress was well aware of this Court's grant of certiorari in this case, and its jurisdiction under 28 U.S.C. 1254(1), but it expressly repealed neither this Court's, nor all of the district court's, jurisdiction. *Amicus Br. of Former Judges Hufstedler & Norris* 4-5. The cases cited by the government beg the question—which is whether the DTA repeals all of the district court's jurisdiction—as the laws at issue in those precedents did.[10]

Second, nothing in the government's lengthy reply brief responds to Hamdan's compelling argument that the DTA does not deprive the district court of jurisdiction over his mandamus claims under 28 U.S.C. 1361. Pet. Opp. 28-29; *Amicus Br. of Arthur Miller* 6-7. Accordingly, the Court is free to reach the merits and remand to the district court (should a remand even be necessary, Pet. Opp. 30 n.30) to issue a writ of mandamus. Not only does Hamdan's mandamus petition allow this Court to avoid *any* constitutional question about the DTA, Pet. Opp. 29, it also sidesteps the government's fear that this Court would be deluged by Guantanamo litigation. Reply 16. Lawsuits that challenge conditions of confinement would end, but not this case.

3. The government also wrongly argues that Hamdan's claims are precluded by section (e)(3)'s "exclusive" review scheme. Nothing in *Thunder Basin Coal Co. v. Reich*, 510 U.S.

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opinions, such as Justice Scalia's *Landgraf* concurrence, favor Hamdan by freezing into place the district court opinion. Pet. Opp. 26)

10. The statute in *Bruner*, for example, stated: "The district courts *shall not have jurisdiction under this section of....[a]ny civil action* to recover fees, salary, or compensation for official services of officers or employees of the United States." 343 U.S. at 113 & n.2 (emphasis added). The statutes in *Hallowell* (Act of June 25, 1910, ch. 431, 36 Stat. 855), and *Gallardo v. Santini Fertilizer Co.*, 275 U.S. 62 (1927) (Act of Mar. 4, 1927, ch. 503, § 48) also eliminated all district court jurisdiction. The DTA, in contrast, only bars district courts from "hear[ing] or consider[ing]" certain actions, and targets their original jurisdiction, not their post-1254(1) activity.

200 (1994), supports that conclusion. Besides the numerous distinctions between the Mine Act and the DTA, Pet. Opp. 20-21, *Thunder Basin* was unequivocal that constitutional claims outside of the agency's expertise, and claims "wholly collateral" to the "comprehensive [] structure" *could* be raised in pre-enforcement proceedings. Pet. Opp. 20-21. The government responds that Hamdan's claims are ones "with which the military is undeniably well-versed." Reply 14. But Hamdan's claims turn on federal statutes, treaties, and constitutional provisions about presidential authority – questions within this Court's, not a commission's, expertise. *Pub. Util. Comm'n v. United States*, 355 U.S. 534, 540 (1958).

Even assuming that Hamdan (1) has no *Abney*-like right to pretrial review (a claim rejected below);[11] and (2) will receive post-final decision review (for which there is no guarantee), the government has yet to contradict Hamdan's contention that the DTA forbids the claims on which certiorari was granted.[12] Without a clear statement, it is impossible to conclude that Congress meant not only to deprive Hamdan of his day in Court *now*, but potentially *forever*.

4. The government further asserts that the DTA "codified" prior abstention doctrine; but that doctrine, as both courts below have found, is inapplicable to structural challenges such as those before this Court. Pet. Opp. 22 (citing sources).[13] The questions presented do not involve

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[11] Nor does the government respond to this argument, save for the unsupported assertion that "petitioner will not suffer irreparable harm" (Reply 14). But Hamdan will suffer a harm comparable to that suffered in both *Abney* and *Schlesinger*. Pet. App. 4a. Moreover, Hamdan does not seek immunity from military trial Pet. Br. 8.

[12] The APA's rejection of judicial supervision is meant only to foreclose Article III *supervisory* or *corrective* review. *See, e.g., Hiatt v Brown*, 339 U.S. 103, 111 (1950); *Ex parte Vallandigham*, 68 U.S. 243 (1864) Hamdan raises no such claim, and no court has *ever* suggested that the comprehensiveness of the military justice system forecloses Article III review of the underlying legality and constitutionality of *ad hoc* tribunals. Both *Quirin* and *Schlesinger* stand decisively to the contrary. Pet. Opp. 14.

[13] Indeed, this Court has made clear that it "did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented. Moreover, it appeared especially unfair to

some minor, collateral challenge that can be dealt with later, but the most basic and foundational questions of all: Is the system that will try this man and potentially impose life imprisonment authorized, and does a defendant have *any* rights under the Constitution, treaties, and laws of the United States?[14] If anything, the fact that the DTA does not guarantee Hamdan any federal court review after conviction, should he never receive a "final decision" or be sentenced to less than ten years, takes this case further outside *Schlesinger*.

5. The fact that the government's interpretation raises so many deep constitutional questions is reason enough to reject it—particularly when a fair interpretation avoids them. Pet. Opp. 32; *Ex parte Burford*, 7 U.S. 448, 449 (1806).

a. The government's sole answer to the Exceptions Clause problem is to suggest that this Court may vacate the judgment below. If the government is reading the DTA to direct the Court to do that, the DTA would prescribe a rule of decision in violation of *United States v. Klein*, 80 U.S. 128 (1872). In any event, vacatur does not solve the problem, which arises from the fact that the government's reading of the DTA bars federal courts altogether from hearing the questions presented in this case—questions that go to the heart of our constitutional order.[15] Pet. Opp. 16 n.13, 25-26.

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require exhaustion of military remedies when the complainants raised substantial arguments denying the right of the military to try them at all." *Noyd v Bond*, 395 U.S. 683, 696 n.8 (1969). To extend abstention to *ad hoc* commissions would, as both courts below found, extend it far past any current use of the doctrine. There is no indication Congress intended that.

[14] The fact that the Court had already answered those questions in the court-martial context made *Schlesinger v. Councilman*, 420 U.S. 738 (1975) possible. So, too, was *Johnson v. Eisentrager*, 339 U.S 763 (1950), made easier by resolution of the threshold questions in *Quirin* and *Yamashita*.

Indeed, the government's abstention claim here simply repeats its argument on the merits, Gov't Br. Opp. Cert. i (proposing it as a question to be added), *id.* 10-16, 21-22, and should be considered alongside them.

[15] This Court has repeatedly explained why monetary precedents such as *Bruner* and *Hallowell* are inapplicable, stating that unlike admiralty, "when fundamental rights are in question, this Court has repeatedly emphasized 'the difference in security of judicial over administrative action'" and that "this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided"

b. With respect to the Suspension Clause, the government first contends that DTA review is an adequate habeas substitute. But the DTA does not permit the questions presented in this case to be raised on post-final decision review, particularly claims based on a treaty. *See Amicus Br. of Center for Nat'l Security Studies* 21-26.

The government next argues that Hamdan has no constitutional rights because he is "detained outside of the United States." Reply 18. This claim disregards this Court's square holding in *Rasul v. Bush*, 542 U.S. 466, 475 (2004), that Guantanamo is within the territorial jurisdiction of the United States and that detainees appear to have rights protected by habeas, *id.* at 484 n.15. Indeed, Justice Kennedy concluded that the detainees had a constitutional right, unlike the petitioners in *Eisentrager*, to bring habeas petitions. *Id.* at 487-88 (Kennedy, J., concurring in the judgment).[16] Hamdan's claim to habeas is stronger than that in *Rasul*, for he is subject to trial and potentially lifetime imprisonment, and the Court's comparative competence is far stronger when assessing the lawfulness of a trial system.

Accordingly, *Eisentrager* is easily distinguished, both because Hamdan is being held in U.S.-controlled territory and because Hamdan contends he is not an enemy alien. Hamdan, a citizen of Yemen (a country not at war with the U.S.), does not resemble the *Eisentrager* petitioners—all twenty-one of whom were citizens of Germany, a country which was in a declared war against our nation. Pet. Opp. 36.

Crowell v. Benson, 285 U.S. 22, 60-62 (1932) (citations and footnote omitted). The principle of *Crowell*, manifested in later cases like *CFTC v. Schor*, 478 U.S. 833 (1986), is that there is a set of Article III values that cannot be divested and given to commissions.

[16] *Rasul* confirms that whether Hamdan has full constitutional protections is beside the point, since he is entitled to the protection of "fundamental rights" such as the Suspension Clause under the *Insular Cases*, including *Downes v. Bidwell*, 182 U.S. 244, 283 (1901). *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990); *id.* at 277 (Kennedy, J., concurring); *Reid v. Covert*, 354 U.S. 1, 9-14 (1957) (plurality). That petitioner has been in prolonged detention only bolsters his claim. *See Demore v. Kim*, 538 U.S. 510, 528 (2003); *id.* at 532 (Kennedy, J., concurring); *Verdugo-Urquidez*, 494 U.S. at 271-72; *Heikkila v. Barber*, 345 U.S. 229, 234-35 (1953)

Eisentrager nonetheless permitted habeas actions to determine whether a state of war existed and whether the individual truly was an enemy alien barred from federal courts under the Enemy Alien Act. 339 U.S. at 775. Hamdan's claims similarly challenge these jurisdictional elements. *E.g.*, Pet. Br. 30-36.[17]

Moreover, while Hamdan may not be protected by the Fourth Amendment abroad, *Verdugo-Urquidez*, 494 U.S. at 269, the government cites no authority to support its assertion that individuals held within *U.S. territory* have no rights under the Suspension Clause or Fifth Amendments. See *Amici Certain Former Federal Judges* 2-12 & n.5.[18]

c. Finally, the government does not contest that, if applicable, equal protection is violated by the irrational distinctions drawn under the DTA between aliens held in Guantanamo and elsewhere, and between those held by the Department of Defense and other agencies. Pet. Opp. 38-39. The fact that the government's interpretation would even force the Court to grapple with this unusual issue, as well as many other constitutional questions—from Bill of Attainder to the Exceptions Clause—strongly counsels against its reading. This Court requires a clear legislative statement—if not a "superclear statement," *INS v. St. Cyr*, 533 U.S. 289, 327 (Scalia, J., dissenting)—before such rights could be altered. *Cf. Lonchar v. Thomas*, 517 U.S. 314, 324 (1995).

CONCLUSION

The motion to dismiss should be denied or, in the alternative, held over for consideration alongside the merits.

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[17] The government's ripeness claim is similarly unavailing. The grant of certiorari, over the government's strenuous claims that this case was interlocutory and that no harm would befall petitioner, itself underscores the gravity and timeliness of the questions presented. This ripeness calculus has not been altered by the DTA. If anything, its denuded review procedures only militate *in favor* of immediate review.

[18] The government's claim - that individuals at Guantanamo are unprotected by the Constitution, despite the textual distinction between the "people" in the Fourth Amendment and the Suspension Clause, merely restates its argument on the merits. E.g., Gov't C.A. Rep. Br. at 4-5; Gov't C.A. Br. 21.

Respectfully submitted,

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February 15, 2006

APPENDIX A

DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2006

* * * * *

TITLE X—MATTERS RELATING TO DETAINEES

SEC. 1001. SHORT TITLE.

This title may be cited as the "Detainee Treatment Act of 2005".

SEC. 1002. UNIFORM STANDARDS FOR THE INTERROGATION OF PERSONS UNDER THE DETENTION OF THE DEPARTMENT OF DEFENSE.

(a) IN GENERAL.—No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

(b) APPLICABILITY.—Subsection (a) shall not apply with respect to any person in the custody or under the effective control of the Department of Defense pursuant to a criminal law or immigration law of the United States.

(c) CONSTRUCTION.—Nothing in this section shall be construed to affect the rights under the United States Constitution of any person in the custody or under the physical jurisdiction of the United States.

SEC. 1003. PROHIBITION ON CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT OF PERSONS UNDER CUSTODY OR CONTROL OF THE UNITED STATES GOVERNMENT.

(a) IN GENERAL.—No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(b) CONSTRUCTION.—Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.

(c) LIMITATION ON SUPERSEDURE.—The provisions of this section shall not be superseded, except by a provision of law enacted after the date of the enactment of this Act which specifically repeals, modifies, or supersedes the provisions of this section.

(d) CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT DEFINED.—In this section, the term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

SEC. 1004. PROTECTION OF UNITED STATES GOVERNMENT PERSONNEL ENGAGED IN AUTHORIZED INTERROGATIONS.

(a) PROTECTION OF UNITED STATES GOVERNMENT PERSONNEL.—In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer,

employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution for any criminal offense by the proper authorities.

(b) COUNSEL.—The United States Government may provide or employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation of an officer, employee, member of the Armed Forces, or other agent described in subsection (a), with respect to any civil action or criminal prosecution arising out of practices described in that subsection, under the same conditions, and to the same extent, to which such services and payments are authorized under section 1037 of title 10, United States Code.

SEC. 1005. PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES.

(a) SUBMITTAL OF PROCEDURES FOR STATUS REVIEW OF DETAINEES AT GUANTANAMO BAY, CUBA, AND IN AFGHANISTAN AND IRAQ.—

(1) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committee on Armed Services and the Committee on the Judiciary of the Senate and the Committee on Armed Services and the Committee on the Judiciary of the House of Representatives a report setting forth—

(A) the procedures of the Combatant Status Review Tribunals and the Administrative Review Boards established by direction of the Secretary of Defense that are in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay or to provide an annual review to determine the need to continue to detain an alien who is a detainee; and

(B) the procedures in operation in Afghanistan and Iraq for a determination of the status of aliens detained in the custody or under the physical control of the Department of Defense in those countries.

(2) DESIGNATED CIVILIAN OFFICIAL.—The procedures submitted to Congress pursuant to paragraph (1)(A) shall ensure that the official of the Department of Defense who is designated by the President or Secretary of Defense to be the final review authority within the Department of Defense with respect to decisions of any such tribunal or board (referred to as the "Designated Civilian Official") shall be a civilian officer of the Department of Defense holding an

office to which appointments are required by law to be made by the President, by and with the advice and consent of the Senate.

(3) CONSIDERATION OF NEW EVIDENCE.—The procedures submitted under paragraph (1)(A) shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee.

(b) CONSIDERATION OF STATEMENTS DERIVED WITH COERCION.—

(1) ASSESSMENT.—The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess—

(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and

(B) the probative value (if any) of any such statement.

(2) APPLICABILITY.—Paragraph (1) applies with respect to any proceeding beginning on or after the date of the enactment of this Act.

(c) REPORT ON MODIFICATION OF PROCEDURES.—The Secretary of Defense shall submit to the committees specified in subsection (a)(1) a report on any modification of the procedures submitted under subsection (a). Any such report shall be submitted not later than 60 days before the date on which such modification goes into effect.

(d) ANNUAL REPORT.—

(1) REPORT REQUIRED.—The Secretary of Defense shall submit to Congress an annual report on the annual review process for aliens in the custody of the Department of Defense outside the United States. Each such report shall be submitted in unclassified form, with a classified annex, if necessary. The report shall be submitted not later than December 31 each year.

(2) ELEMENTS OF REPORT.—Each such report shall include the following with respect to the year covered by the report:

(A) The number of detainees whose status was reviewed.

(B) The procedures used at each location.

(e) JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS.—

(1) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

"(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

"(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

"(A) is currently in military custody; or

"(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.".

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien—

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) TERMINATION ON RELEASE FROM CUSTODY.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

(3) REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS.—

(A) IN GENERAL.— Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) GRANT OF REVIEW.—Review under this paragraph—

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(C) LIMITATION ON APPEALS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien—

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent

with the Constitution and laws of the United States.

(4) RESPONDENT.—The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection.

(f) CONSTRUCTION.—Nothing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States.

(g) UNITED STATES DEFINED.—For purposes of this section, the term "United States", when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba.

(h) EFFECTIVE DATE.—

(1) IN GENERAL.—This section shall take effect on the date of the enactment of this Act.

(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS.—Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

* * * * *

APPENDIX B

November 10, 2005
CONGRESSIONAL RECORD—SENATE
S12655

The Senator from South Carolina [Mr. GRAHAM], for himself, Mr. KYL, and Mr. CHAMBLISS, proposes an amendment numbered 2515.

MR. GRAHAM. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

THE PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: Relating to the review of the status of detainees of the United States Government)

At the end of subtitle G of title X, add the following:

SEC.___. REVIEW OF STATUS OF DETAINEES.

(a) SUBMITTAL OF PROCEDURES FOR STATUS REVIEW OF DETAINEES AT GUANTANAMO BAY, CUBA.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the congressional defense committees, and to the Committees on the Judiciary of the Senate and the House of Representatives, a report setting forth the procedures of the Combatant Status Review Tribunals and the noticed Administrative Review Boards in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay.

(b) PROCEDURES.—The procedures submitted to Congress pursuant to subsection (a) shall, with respect to proceedings beginning after the date of the submittal of such procedures under that subsection, ensure that—

(1) in making a determination of status of any detainee under such procedures, a Combatant Status Review Tribunal or Administrative Review Board may not consider statements derived from persons that, as determined by such Tribunal or Board, by the preponderance of the evidence, were obtained with undue coercion; and

(2) the Designated Civilian Official shall be an officer of the United States Government whose appointment to office was made by the President, by and with the advice and consent of the Senate.

(c) REPORT ON MODIFICATION OF PROCEDURES.—The Secretary of Defense shall submit to the committees of Congress referred to in subsection (a) a report on any modification of the procedures submitted under subsection (a) not later than 30 days before the date on which such modifications go into effect.

(d) JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS.—

(1) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"(e) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien outside the United States (as that term is defined in section 101(a)(38) of the Immigration and Naturalization Act (8 U.S.C. 1101(a)(38)) who is detained by the Department of Defense at Guantanamo Bay, Cuba.".

(2) CERTAIN DECISIONS.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of

Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any decision of a Designated Civilian Official described in subsection (b)(2) that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien—

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the procedures and standards specified by the Secretary of Defense for Combatant Status Review Tribunals.

(D) TERMINATION ON RELEASE FROM CUSTODY.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release

of such alien from the custody of the Department of Defense.

(3) EFFECTIVE DATE.—The amendment made by paragraph (1) shall apply to any application or other action that is pending on or after the date of the enactment of this Act. Paragraph (2) shall apply with respect to any claim regarding a decision covered by that paragraph that is pending on or after such date.

APPENDIX C

November 14, 2005
CONGRESSIONAL RECORD—SENATE
S12752 - S12753

National Defense Authorization Act For Fiscal Year 2006—Continued

Amendment No. 2524 to Amendment No. 2515

MR. GRAHAM. Mr. President, I send an amendment to the desk.

THE PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from South Carolina [Mr. GRAHAM], for himself, Mr. LEVIN, and Mr. KYL, proposes an amend-ment numbered 2524 to amendment No. 2515.

MR. GRAHAM. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

THE PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To improve the amendment)

In lieu of the matter proposed to be inserted, insert the following:

SEC.___. REVIEW OF STATUS OF DETAINEES.

(a) SUBMITTAL OF PROCEDURES FOR STATUS REVIEW OF DETAINEES AT GUANTANAMO BAY, CUBA.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the congressional defense committees, and to the Committees on the Judiciary of the Senate and the House

of Representatives, a report setting forth the procedures of the Combatant Status Review Tribunals and the noticed Administrative Review Boards in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay.

(b) PROCEDURES.—The procedures submitted to Congress pursuant to subsection (a) shall, with respect to proceedings beginning after the date of the submittal of such procedures under that subsection, ensure that—

(1) in making a determination of status of any detainee under such procedures, a Combatant Status Review Tribunal or Administrative Review Board may not consider statements derived from persons that, as determined by such Tribunal or Board, by the preponderance of the evidence, were obtained with undue coercion; and

(2) the Designated Civilian Official shall be an officer of the United States Government whose appointment to office was made by the President, by and with the advice and consent of the Senate.

(c) REPORT ON MODIFICATION OF PROCEDURES.—The Secretary of Defense shall submit to the committees of Congress referred to in subsection (a) a report on any modification of the procedures submitted under subsection (a) not later than 60 days before the date on which such modification goes into effect.

(d) JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS.—

(1) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"(e) No court, justice, or judge shall have jurisdiction to hear or

consider an application for a writ of habeas corpus filed by or on behalf of an alien outside the United States (as that term is defined in section 101(a)(38) of the Immigration and Naturalization Act (8 U.S.C. 1101(a)(38)) who is detained by the Department of Defense at Guantanamo Bay, Cuba.''.

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any decision of a Designated Civilian Official described in subsection (b)(2) that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien—

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the

District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien applied the correct standards and was consistent with the procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor the Government's evidence); and

(ii) whether subjecting an alien enemy combatant to such standards and procedures is consistent with the Constitution and laws of the United States.

(D) TERMINATION ON RELEASE FROM CUSTODY.— The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

(3) REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS.—

(A) IN GENERAL.—Subject to subparagraphs (C) and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) GRANT OF REVIEW.—Review under this paragraph—

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(C) LIMITATION ON APPEALS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien—

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the final decision applied the correct standards and was consistent with the procedures specified in the military order referred to in subparagraph (A); and

(ii) whether subjecting an alien enemy combatant to such order is consistent with the Constitution and laws of the United States.

(e) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided in paragraph (2), this section shall take effect on the day after the date of the enactment of this Act.

(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS.—Paragraphs (2) and (3) of subsection (d) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

APPENDIX D

Michigan
Carl Levin
United States Senator

FOR IMMEDIATE RELEASE
January 12, 2006

Contact: Press Office
Phone: 202.228.3685

Levin Statement on the Department of Justice Motion to Dismiss the Hamdan Case in the Supreme Court

WASHINGTON – Sen. Carl Levin, D-Mich., issued the following statement regarding the Justice Department's Motion to Dismiss the Hamdan case on the basis of the Graham-Levin Amendment:

Earlier today, the Justice Department filed a brief asking the Supreme Court to dismiss the Hamdan case on the ground that this year's Defense Authorization and Appropriations Acts "plainly divest[] the courts of jurisdiction" over the case.

The Justice Department is in error. Far from deciding that the relevant statutory language applies to pending cases, Congress specifically considered and rejected language that would have stripped the courts of jurisdiction in cases that they had before them.

Throughout the consideration of the bill, the White House repeatedly urged the inclusion of language that would have stripped the courts of jurisdiction over **pending** cases. In each case, I objected to this language. As a result, **no such language was included in the final version of the legislation**.

Specifically, the original Graham amendment considered by the Senate (and adopted on a 49-42 vote)

contained language stating that the provision "shall apply to any application that is pending on or after the date of the enactment of this Act." I opposed the amendment, arguing that the Hamdan case, now pending in the Supreme Court "would be wiped out under the language" and that as a result, the Court "would be stymied in hearing a case they have agreed to hear."

I then worked with Senator Graham to modify the previously adopted language. The Graham-Levin amendment **eliminated** the language stating that the provision would apply to pending cases. As I stated when the modified amendment was placed before the Senate, the compromise language was specifically designed to ensure that the courts would not lose jurisdiction over pending cases. I said to the Senate:

> "The other problem which I focused on last Thursday with the first Graham amendment was that it would have stripped all the courts, including the Supreme Court, of jurisdiction over pending cases. What we have done in this amendment, we have said that the standards in the amendment will be applied in pending cases, but the amendment will not strip the courts of jurisdiction over those cases. For instance, the Supreme court jurisdiction in Hamdan is not affected."

The modified amendment was then adopted by a vote of 84-14.

Before the bill passed the Senate, the White House made an effort to reinsert language applying the amendment to pending cases. Their proposed language stated that the provision "shall apply to any application

or other action that is pending on or after the date of the enactment of this Act, except that the Supreme Court of the United States shall have jurisdiction to determine the lawfulness of the removal, pursuant to such amendment, of its jurisdiction to hear any case in which certiorari has been granted as of such date". I objected to this language and **it was not included in the Senate-passed bill**.

During the conference between the Senate and the House of Representatives, the House conferees proposed language sought by the White House, which would have applied the amendment to pending cases. The language proposed by the House conferees stated that the provision "shall apply to any application or other action that is pending on or after the date of enactment of this Act." I objected to this language and **it was not included in the final version of the legislation**.

As stated before passage of the final conference report—

> "The conference report retains the same effective date as the Senate bill, thereby adopting the Senate position that this provision will not strip the courts of jurisdiction in pending cases. . . . [T]he conference report states that the provision 'shall take effect on the date of the enactment of this Act.' These words have their ordinary meaning — that **the provision is prospective in its application, and does not apply to pending cases.**" (emphasis added).

The Administration is wrong when it argues otherwise.

APPENDIX E

December 17, 2005
CONGRESSIONAL RECORD—SENATE
S13953

DEPARTMENT OF DEFENSE AUTHORIZATION CONFERENCE REPORT

MR. LEVIN. Mr. President, I wish to talk about a different bill, a bill we thought was finally put to bed yesterday. When we say "put to bed," what we conferees mean is the conference is over and that all of the members of the conference have signed the conference sheets, the signature sheets which signify that document that is attached to those sheets is the final version and that then will be presented to both Houses for their consideration.

Senator WARNER came to the Chamber last night to express his dismay with what we understand now has happened in the House, and that is that the House leadership is apparently toying with the idea, considering the possibility of trying to insert in that conference report a totally unrelated bill that is not part of either the House or the Senate Defense authorization bill, which is totally unrelated to the subject matter of the Defense Authorization Act.

To me, it is not important what the substance of the bill is that the House Republican leadership wants to attach. The principle is important. The principle is one of the fundamental principles under which we operate in this body and in this Congress, and that is, once a conference report is agreed to, once those signature sheets have been attached, nothing can just be inserted, unless, of course, the conference report is rejected or the report is referred back to conference.

There are rules that the House gets the conference report first, and that allows that body to return a conference report for further consideration. But what is happening here is not that there was going to be a conference report taken up in the House with a motion to refer back to conference to consider other material. Here, apparently, from what we understand, the House leadership was attempting to find some way to add significant legislation to a conference report on which the signature sheet had already been signed by all of us.

Senator WARNER came to the Chamber last night to express his dismay with this process. As always, Senator WARNER is extraordinarily honorable. For him, it is not important what the subject matter of this added legislation is. It is the principle involved. It is the process involved. We cannot possibly operate under a procedure where after a conference is over and the signature sheets are signed that then there is an effort made without, I guess, the body reopening the conference by sending it back to conference for reconsideration but just simply looking for a mechanism to add legislation to a conference report which had already been signed. Senator WARNER said something last night that I concur in 1,000 percent. In fact, everything he said last night I concur in 1,000 percent because he is a Senate man. He is an institution man. He loves this institution. And the idea that we could have a process where a conference report is signed and then, somehow or other, through some mysterious mechanism or means, additional legislation is added to it without that conference being reorganized and the House, the first body that receives this conference report, referring it back to conference, is a totally unacceptable process.

The chairman of our committee, Senator WARNER, last night said he was not going to accept this process.

He would filibuster his own bill if it contained material we had not considered and was now showing up in a conference report. And I would join him in that filibuster. He would exercise the rules of this body to ask the Chair to rule that there is out-of-scope material in this conference report, and I would join him in asking the Chair to make such a ruling.

This is separate and apart from whether he or I agree with the material which was proposed to be added. By the way, for whatever relevance it has, I think probably both of us would be inclined to support the material which was intended to be added if it ever came to the floor in a proper way. I don't want to commit myself to that position because I haven't seen the actual material proposed to be added, but what I know of the subject matter, it would be the type of change in our law which I probably would support and, without speaking for Senator WARNER, I think he is probably inclined to support, too. That is not the issue. We can't treat our colleagues that way. This is a controversial matter which is proposed to be added. There is a very strong debate over the subject matter. Regardless of what our position is, as the chairman and ranking member of this committee, we cannot bring back from the conference a document which contains material which had never been discussed in conference, never the subject of debate in either the House or the Senate, was not in the House or the Senate bill, and is totally nongermane to the subject matter of the conference report.

We all know there are items added to conference reports that were not in either bill. That happens. But under our rule, the only way it now happens is if it is material to which everybody agrees. It cannot be material which is not in agreement by the Members of the two bodies. We cannot possibly, as a matter of principle, have a process where a conference report

comes back containing material not germane, not relevant, not material to the conference, not the subject of either bill that passed either House, and which is added after the signature sheets have been signed.

I wanted to come to the Chamber and say what has happened because we heard this effort was being considered—just being considered—by the House Republican leadership. Senator WARNER and I asked our staff to go over to the House and retrieve our signature sheets.

APPENDIX F

November 14, 2005
CONGRESSIONAL RECORD—SENATE
S12754 - S12755

MR. LEVIN. I thank my friend from South Carolina for working on this matter as hard as he has. The Senator from Arizona has also worked hard. Many Members on this side have worked on this issue as well as the Republican side. There is a lot of thought that has been given to this matter.

The amendment approved last Thursday had some real problems with it, in my judgment, and I voted against it, as did 41 Senators. The amendment which was approved last Thursday, which is the one now awaiting this amendment, would have provided for review only for status determinations and not of convictions by military commissions.

As my friend from South Carolina pointed out, that is an omission which he and others acknowledge. It is a real indication of his commitment to try to figure out what the right course of action is, that he does acknowledge that omission. One of the reasons I voted against the amendment last Thursday is that it did not provide for that direct judicial review of convictions by military commissions. That is the major change in the amendment before the Senate, the so-called Graham-Levin-Kyl amendment which is before the Senate.

There are a number of other changes as well, but of all the changes, what this amendment does is add to the Graham amendment, which was agreed to last Thursday, adds a direct appeal for convictions by military commissions—not just for status determinations—and that direct appeal would, of course, go to a Federal court.

The amendment which we are going to consider tomorrow morning, after we consider the Bingaman amendment, will also provide for review of whether the standards and procedures which are referred to in the amendment are consistent with the Constitution and laws of the United States. Those are important words because all Members believe we must operate according to our Constitution. Our laws and the review which is provided for now, if we agree to this amendment to the adopted Graham amendment, would explicitly make it clear that the review of a court would look at whether standards and procedures that have been agreed to are consistent with our Constitution and our laws.

The other problem which I focused on last Thursday with the first Graham amendment was that it would have stripped all the courts, including the Supreme Court, of jurisdiction over pending cases. What we have done in this amendment, we have said that the standards in the amendment will be applied in pending cases, but the amendment will not strip the courts of jurisdiction over those cases. For instance, the Supreme Court jurisdiction in Hamdan is not affected.

However, what our amendment does, as soon as it is enacted and the enactment is effective, it provides that the standards we set forth in our amendment will be the substantive standards which we would expect would be applied in all cases, including cases which are pending as of the effective date of this amendment.

We will first vote on the Bingaman amendment tomorrow. I will vote for that amendment. It does preserve some habeas corpus review of constitutional issues relative to the detention of enemy combatants at Guantanamo Bay. It avoids habeas corpus review of less consequential issues, while enumerating the important

issues which it would provide or permit habeas review of.

However, I cosponsored the Graham amendment with Senator GRAHAM because I believe it is a significant improvement over the provision which the Senate approved last Thursday, specifically for the two main reasons I identified. The direct review will provide for convictions by the military commissions, and because it would not strip courts of jurisdiction over these matters where they have taken jurisdiction, it does, again, apply the substantive law and assume that the courts would apply the substantive law if this amendment is agreed to. However, it does not strip the courts of jurisdiction.

My friend from South Carolina has pointed out what the scope of the review would be if this amendment was agreed to. I will read something which he made reference to that is important it be very clear as to what this grant of review is on page 6, paragraph B:

> (i) with respect to a capital case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or
>
> (ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

The scope of review is set forth. It gets the Congress back into the business of laying out the ground rules for these reviews, which has been the main goal of the Senator from South Carolina. It is a goal which I hope all share. We may disagree as to what the ground rules are, but I hope all Members share in that goal that Congress become re-involved in setting the ground rules

for both the commissions and for the tribunals which make the status determinations.

Again, it has been a very constructive effort on the part of Senator GRAHAM, myself, Senator KYL, and others who cosponsored and will vote for this. It makes a significant improvement over what the Senate did last Thursday. Again, I as one Senator will first support the Bingaman amendment, but if it is not agreed to, I will strongly urge our colleagues to vote for the Graham-Kyl amendment.

I support my friend from South Carolina.